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MiFID II
'Quick fix'

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EU Directive 2021/338 has introduced several amendments to MiFID II which will come into effect on the 28 February 2022. The amendments are not an overhaul of regulation, but a ‘quick-fix’ intended to alleviate some of the administrative burdens on investment firms particularly in light of the COVID-19 pandemic.

Locally, the ‘quick-fix’ changes have already been implemented through revisions to the Conduct of Business Rulebook as outlined in a circular published by the MFSA on the 16 November 2021. The amendments will apply as from 28 February 2022 and will affect all investment firms regulated by MIFID II. Some of the key changes include:

- Electronic communications with clients, shifting the default method of communication to electronic based communications with a right to opt-in for paper-based communications for Retail Investors.
- Delayed transmission of cost information when using distant communication channels.
- Costs and charges disclosure requirements - Information on costs and charges no longer need to be disclosed to professional clients and eligible counterparties provided that the services being provided do not include investment advice and portfolio management services.
- Ex post reporting requirements - The obligation to provide clients with ex post reports on services, including type and complexity of products, nature of services and associated costs, shall no longer apply to professional clients. However, professional clients have the right to opt-in to receive such reports, and proper records of the professional clients’ opt-in communication are to be kept.
- Cost-benefit analysis with regards to switching - The cost-benefit analysis which investment firms carry out to demonstrate to clients whether the benefits of switching a financial product will outweigh the costs, is no longer required in respect of professional clients. Again, a right to opt in for professional clients applies. The glossary now also includes a new definition of “switching of financial instruments.”
- Product governance – certain product governance requirements shall no longer apply where (i) financial instruments are marketed or distributed exclusively to eligible counterparties or (ii) investment services provided relate to bonds with no other embedded derivative than a “make-whole” clause. Note that ESMA has clarified in its Q&A that non-complex bonds remain subject to product governance requirements (i.e. this exemption only applies to bonds with just a make-whole clause and no other embedded derivative).

The product governance requirements include: (i) the requirement to ensure that product designs meet the needs of identified target markets and that their distribution strategy is compatible with the identified target market while taking all reasonable steps to ensure the product is distributed to the identified target market; (ii) the obligation to make available to distributors all appropriate information on the product and product approval process to the identified target market; (iii) maintaining a product approval process for each new product or significant adaptation of existing products; (iv) reviewing and understanding the products and taking into account events which could materially affect the potential risk of the identified target.

- Best execution reports - The obligation of each trading venue and systematic internaliser for financial instruments, to make available to the public, information relating to the quality of execution of transactions on the respective venue, on an annual basis, is being suspended until 28 February 2023. The European Commission will decide whether this reporting obligation should be revised or removed permanently.

The MiFID II 'quick-fix' also introduces new rules on:

- Research unbundling - Investment firms providing portfolio management or other investment or ancillary services to clients may receive research from third parties (third parties who are also providing execution services to the investment firm) without having to pay separately for the research. This is possible provided a number of conditions are satisfied. The scope of this new provision is to increase availability of research on issuers (particularly SMEs) and their ability to access funding.
- Ancillary activity exemption - While the ancillary activity exemption was already operative under MIFID II, Directive 2021/388 requires the European Commission to adopt a new Delegated Regulation which will replace RTS 20. A draft Delegated Regulation has already been published by the European Commission.
- Position limits - The commodity derivatives position limits regime within MIFID II is being changed to apply to critical or significant commodity derivatives traded on trading venues and in economically equivalent OTC contracts. Critical or significant derivatives shall be commodity derivatives with an open interest of at least 300,000 lots on average over a one-year period. On 22 November 2021, ESMA published its draft Regulatory Technical Standards for commodity derivatives under MIFID II Quick-Fix.



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171, Old Bakery Street, Valletta VLT 1455, Malta
+356 2123 5406
ganado.com

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